THE PHILOSOPHY OF COPYRIGHT

By ERNEST BRUNCKEN

IT is very likely that in modern times, if not in earlier days, there are no artists or authors of any kind, and especially no musical authors, who do not consider their "copyright" as something to which as a matter of course they are entitled in morals; and if the law does not give it to them in full measure, they are inclined to say that the law falls behind what it should be in order to achieve its own ideal of justice. Few people of trained intelligence will be disposed to quarrel with them on this point; but all might not agree on the philosophical reason for such a claim. Nothing is more commonly heard among authors than expressions such as this: If a man makes a coat it belongs to him; if he makes a song, why should that not be his also? Yet, it is very curious to find that the self-evident equity of copyright protection, implied in such a question, is by no means so self-evident to the generality of mankind who are not authors and do not derive their opinions directly from authors or artists. The man who steals my coat, or the defaulting bank official who filches my savings, does not deny that I am entitled to my property. Yet the unsophisticated mass of people need considerable explanation before they understand that it is wrong to perform a musical composition in public, or even to copy the notes embodying it, without first getting the composer's permission. Who is wrong, the author who insists on his right, or the man on the street who fails to see that such right exists?

One reason why people's ideas are confused regarding this subject may be the habit lawyers have of speaking of copyright as "property." It is not hard to understand that in reality the privilege of exercising certain control over the products of one's artistic talent is not the same thing as the privilege of exercising dominion over some tangible thing. A work of art is not a tangible thing—it is a creation of the mind, to which a human being can have relations only through his mind, never through his body in the way in which he may handle his coat or his money. In the case of literary and musical works, the truth of this is seen easily enough even by untrained intellects. Hardly anybody will fail to understand that the paper and ink by means of which the

work of the author is recorded is not that work itself. In the case of painting or sculpture, this distinction is a little less apparent. Very commonly, men who have bought a picture are greatly astonished when they are told that they have no right to have it reproduced without the consent of the artist. To readers of this magazine, it will not be necessary to explain how the canvas and paint a multimillionaire may hang in his gallery is no more that work of Rembrandt for which he pays a hundred thousand dollars than the manuscript of the Ninth Symphony is the work for which Beethoven has become immortal. Wherefore the law very properly provides that the purchase of certain canvas and paint, or certain pieces of paper and ink, does not imply a purchase of the copyright.

The law is not to be blamed for calling by the same name of "property" such diverse conceptions as the right to dispose of something one may handle or carry about, and the right to forbid or allow the multiplication of the corporeal object used for recording the ideas of an author. Property is a general term expressing a considerable number of things besides those mentioned. The thing these have in common, and which makes them property, is that they involve a legal power of dominion or control on the part of a person called the proprietor over something outside of himself. The difficulty arises merely from the inability of many people to realize that such relations can exist between a man and something which is not of a tangible, corporeal kind.

However, to say that it is possible for property to exist in a certain subject matter does not prove that such property should exist. It is the purpose of this article to inquire why, if at all, artists, writers, and musical composers should be accorded a privilege which to not a few otherwise intelligent and honest members of society seems incomprehensible.

The reason that will probably occur most readily to authors themselves is one based on the idea that what a man has himself made should belong to him. If this proposition is ever to be accepted at all as the foundation of property, it must certainly include artistic, literary and musical property, even if it were rejected regarding other kinds. For it seems to imply that the product of a man's labor is a part, so to speak, of his own personality. Undoubtedly there is much truth in that theory. For whatever a man makes embodies in itself and expresses to the outside world the peculiar, distinctive nature of that particular man. If a man makes a shoe, it is quite certain that no other man could have made a shoe of exactly that kind. However

slight the differences may be which distinguish his shoe from one his neighbour makes according to the same pattern, they do exist and are an expression of precisely those slight differences of individual physique, temperament and character which make him a different man from that neighbour. To deprive him of the shoe against his will would indeed amount to an invasion of his personality. It would be hardly less than taking away a part of his individual right of self-determination. It might differ in degree, but not in kind from making him love or hate, feel interested or be bored against his will—if such a thing could be accomplished. Now, if that is true of a mere artisan, whose skill is mostly in his hands, it is many times more applicable to labor involving the highest degrees of imagination, such as works of literature, art and music. To deprive a man of the power to dispose as he wills of such products of his mind, is an invasion of his personality of the most serious nature. For what can be more intimately connected with the very essence of a man's being than the spiritual products of his own mind?

If therefore we assume that we have the true basis for property rights in the theory that a man is, by the very nature of justice, entitled to have dominion over the product of either his hand or his brain, we must certainly admit that artists should have their copyright. We shall even be obliged to go much farther in that direction than any law actually in force has ever gone. For we shall have difficulty in finding a just reason why any limitations whatsoever should be placed on the right of any author to do with his own precisely as he pleases, to allow one person to read his book or play his composition and to prohibit another from doing so—or to allow one man to copy it and keep another from doing so for all time to come. Such complete dominion is accorded to the shoemaker. Yet there is not a country in the world where the law does not put serious limitations on the rights of authors over their works. They may keep them locked up in their desks, or destroy the original manuscript; but the moment they have published them, their legal rights at once become very much restricted. Just what these restrictions are may differ at different times and in different countries, but practically without exception all rights of whatever nature will come to an end absolutely after a more or less protracted period, while the dominion of the shoemaker over his product remains in him or the purchaser for all time to come. Either the law actually in force falls far short of its own standard of justice, or the basis of property rights, in works of literature and art at least, must be something different

from the mere fact that the author has produced the subject matter of such rights.

However, there is a large body of judicial and sociological thought upholding the theory of property by production, if we may use this term. All those who believe that there exist, in the very nature of things, certain definite and immutable principles of right which the law actually in force should endeavour to approximate as closely as possible, would presumably incline in this direction. For evidently the proposition that it is unjust to deprive a man of dominion over something he has himself produced implies some such immutable principle of justice which must be entirely independent of any desires or opinions of men. The believers in immutable principles of justice that are quite independent of the desires or opinions of men are commonly known in law and sociology as the adherents of the Law of Nature school. As a corollary to their belief in absolute principles of justice, these men will, if they are at all logical, believe also in what is commonly called individualism; that is, they will hold that all laws and other social arrangements have for their aim and object the welfare of the individuals composing society. According to them, the State, and all other forms of association by which men try to gain common ends, are merely instruments to further the purposes of individuals. No social arrangement has any value apart from the individuals whom it serves. All such ideas accord very well with the notion that authors, like the producers of any other thing, are entitled to the fullest dominion over their work. If there is to be any restriction of this right at all there can be but one excuse, and that is where it can be proven that by insisting on the full measure of his right the author necessarily encroaches on some equally fundamental and immutable right of others.

There was a time when the Law of Nature school held undisputed sway over the minds of lawyers and all others who thought on such subjects. That, however, is long ago. During the last hundred years or so, quite a different set of ideas has gradually made headway. While there are still a great many people who, whether they are fully conscious of the fact or not, entertain notions in substantial accord with the Law of Nature doctrine, a majority of social thinkers have abandoned these doctrines brought down from the eighteenth century. The author who bases his claim of unlimited copyright on the fact that he produced the work is likely to find no such undivided theoretical assent as he might have done seventy-five years ago.

Sociological thinkers at the present time incline to denying that such things exist as immutable, fundamental principles of right. They may not be agreed on what is the true basis of property, but they are nearly all certain that whatever basis there may be, instead of being the same at all places and in all ages, changes in accordance with the circumstances of any given human society. Although justice may never die, yet what is just in any particular instance depends on what the men forming society may think about it, and the men of to-day may think very differently from what their predecessors thought. Again, as a corollary of this notion of a changing content of the formal concept "justice," many modern thinkers no longer accept the doctrine that all social arrangements are merely for the benefit of the individuals composing society. It cannot exactly be said that we have reversed the position and maintain that individuals exist for the benefit of society. The truth is rather that we are disinclined to put the individual and society into the sharply contrasted positions in which it was customary to represent them formerly. People had a more or less definite notion that men at one time lived without forming a society. That was the doctrine of the state of nature which was followed by the famous social contract, supposed to have been concluded of deliberate purpose in order to obtain certain benefits a social life seemed to promise. At the present time it is difficult even to imagine a condition where human beings did not form some sort of society, however rudimentary. In fact, a being looking like a man but belonging to no human society could not, in the opinion of many, properly be called a man at all. Whatever we may think about that, most thinkers would agree, nowadays, that the welfare of the individual and the good of society cannot be separated, and that in consequence no right, whether of property or anything else, can be superior to the claims of society.

Following the trend of these ideas we shall come to the conclusion that the justice of a composer's claim to copyright must be measured by what may appear to be the highest interest of society. If it should turn out that society would be better off if all copyright laws were abrogated the author could appeal to no principle of justice higher than the social will; for according to the views we are now considering society itself determines what is just. Accordingly, we shall have to consider the needs of society, and society alone, when we wish to determine whether any particular restriction on an author's rights is either just or expedient.

However, the poor author need not be afraid that his own interests will be entirely overlooked. Fortunately for him it happens that the general welfare of the world and that of the individual are opposed to each other in exceptional cases only. Still more often, the interests of individuals are of such a nature that under most conditions society feels indifferent to them, so that they are left to be regulated in the same manner as if there were no society to assert its own claims. The outcome of these circumstances is that in all discussions of the rights of authors one should consider the subject from three distinct points of view: The interests of the authors; the interests of those who may desire to enjoy the works produced by the authors, or if we may apply a purely economic terminology to such matters without hurting the feelings of that *irritabile genus*, the artistic soul, the interests of the consumers; and finally the interests of society in general. According to the view of the modern school of "sociological" thinkers, the last-named must under all circumstances be paramount if they happen to be in conflict with those of either or both the other classes.

The interest which the author—whether he is a literary writer, a musical composer, or a worker in what is termed art in a narrow sense—has in his work after it is produced is of a double nature. One we may call the artistic, the other his economic interest. We may assume that to the true artist the former is far more important than the economic relation; and although there be those to whom art is merely a convenient means of acquiring economic advantages, yet we may be justified in the optimistic belief that works of literature, art and music would still be produced if they were deprived of every form of economic value. In fact, the neglect with which many artists treat the economic side of their work has been an important factor in shaping the laws that regulate copyright and giving an advantage of doubtful equity to the mere publisher or interpreter, over and above what of right ought to go to him.

The rights to which an author is justly entitled from an artistic point of view may be summed up by saying that his work ought not to be altered without his consent. It would be hard to imagine a greater grievance than that of a poet who should find his poem published with all sorts of negligent, ignorant or malicious changes, destroying or weakening the effect he intended to produce. The composer, in a similar way, would properly object to having his manuscript reproduced with changes unauthorized by himself; but beyond that he is in a worse position

than his literary brother. For music, in order to be enjoyed or "consumed," requires the performer who acts as intermediary between the composer and the public. It would hardly be practicable to give the author the privilege of deciding who shall and who shall not sing or play his composition after he has once published it. Not only would the task of making such selection be beyond the power of any man, but his economic interests are a powerful incentive for the composer to renounce such privileges. Nevertheless, even we who are not artists can imagine the torture a composer must feel when he hears incompetent performers destroy all the best effects of his work. From the purely artistic point of view, there is no reason apparent why such a right of selecting the performers should not be retained by the composer if he is willing to disregard his possible economic losses. As a matter of fact efforts are sometimes made to assert such a privilege, as in the case of Wagner's Bayreuth works. If the right is to be denied it must be on the ground of paramount claims on the part of the "consumer" of music or of society at large.

The economic interests of the author in his work are a great deal more complicated than is the artistic one, so far as the latter can have any influence over the laws regarding his copyright. They are more complicated even than is imagined by those who are ignorant of the many changes the law of property has undergone during the numerous stages through which economic society has passed in historical times. A majority of men seem to be unable to realize that the customs and ideas with which they are familiar are not necessarily the only ones by which rational beings may regulate their affairs. Consequently they are apt to mistake temporary means of accomplishing economic or social ends for the only possible ones. Something like this happens whenever authors imagine that the right to dispose of their works for money, or to exact money for the privilege of performing them, is identical with those just rights regarding their works which the law ought to preserve for them. This notion is based on ignorance of the historical fact that not so very long ago no literary or musical author was able to obtain pay for his work from any person whatsoever. The present custom of paying for manuscripts, or rather of compensating the author by money for the trouble he goes to in producing his work for the delectation of others, has gradually sprung up as one of the minor phases of a great social and economic development which historians call the rise of capitalism. It is only within the last two hundred

years or so that this movement has assumed those extensive proportions which at the present moment make it the dominant feature of the economic and social world.

The musical composer, like every other kind of author, is not primarily interested in getting money for his work. What he is really interested in is to be so circumstanced economically that he can live in about the same style of comfort as those with whom he principally associates. Beyond that, he properly desires to hold a social position sufficiently high that he may not be cramped, by the humbleness of his place in life, in the proper development of his talents; and finally, he may fairly ask that he shall not be burdened with duties of a kind that are inimical to the healthy life of his artistic powers. In days not so very long ago these interests were ordinarily satisfied by the composer or literary author becoming attached to the establishment of some patron of wealth and high social station. The patron supplied him with the means of living in a manner such as the public opinion of the time deemed appropriate, and in doing so performed one of the duties which the same public opinion imposed on persons of rank. Occasionally, an author might obtain a livelihood by entering the service of the Church or some city. Or he might himself have sufficient means to support him, or follow some other trade or profession and be an author or composer in his leisure hours only, just as might be the case at the present day. At any rate, he was not dependent for the means of support on the possibility of selling the products of his artistic talent in competition with hundreds of others in the same predicament. In no sense were his means of livelihood directly proportioned to the quantity of work he did and the success he had in disposing of his wares to the public. His living was assured as long as he retained the favor of his patron, or could find another if he quarreled with him, even if the work he did was very small in quantity or appealed to a limited circle. The dependence on a patron was not itself felt as something irksome in those days, for under the reign of feudalist and other aristocratic institutions the dependence of one man upon another was the universal rule. Public opinion approved of it, and in the lower as well as the higher circles of such a society many people no doubt imagined that this arrangement was the only desirable one, just as to-day many believe that our present arrangements must always have appeared preferable to every other kind.

It is easy to see that the question of copyright was not of very much importance to musical or literary authors so situated.

They were provided for, whether they could sell copies of their works or not. Presumably there was an occasional author in whom the quality of acquisitiveness was exceptionally developed and who would therefore be anxious to make all the money he could; but generally, the absence of a market for musical compositions was not felt to be a particular grievance. Consequently there was no occasion for the rise of a system of copyright laws in the modern sense.

When copyright laws finally did arise, it was not on account of the authors but on account of the printers. Through the inventions of printing, engraving and similar reproductive arts it became possible to make large numbers of copies of every manuscript, and it was the most natural thing in the world for the skilled artisans who did this sort of work, to sell the copies in the open market instead of waiting for an order before they started on the work. The copies were cheap, and consequently the market was large. At first it never entered anybody's mind to think that the author or composer had any interest in the multiplication and sale of such copies, but when this new kind of trade had assumed considerable proportions, the printers, or publishers, themselves discovered that it would be to their advantage if they could persuade an author to write a composition or a book for their own special benefit. The simplest means of persuasion was to pay him money and thus for the first time authors discovered that what they produced had a direct pecuniary value, apart from the favor a work might gain in the eyes of some bountiful patron. A long time passed, however, before authors generally could rely on the sale of their manuscripts to publishers for making a respectable living. Two hundred years ago, to be a publisher's hack living on the proceeds of one's pen came pretty near to being the lowest depth of misery a man might sink to. In the case of the musical composer, the possibility of building an appreciable part of one's economic existence on the sale of manuscripts to publishers was even later in coming. However, the musician was more fortunate than his literary brother because he was usually a performer or conductor, as well as a composer, and as such his services had a market value long before his manuscripts had.

When a publisher had paid good money to an author, he was naturally anxious that some competitor should not publish the same work without paying for the privilege. Thus it was that the need for copyright laws first arose. The business of the publisher was carried on in the capitalistic manner, which means

that some person having sufficient money to buy the necessary tools and materials, hires men to do the work for wages while the finished product becomes his own, to be sold to the consumer. In the centuries preceding the invention of printing, it was rather the exception for any business to be carried on in that manner; but just about the time when printing became common, the capitalistic way of doing business began to grow more frequent, and this process has continued until to-day it is a rare thing to find business done in any other way. As copyright laws began just when the growth of capitalistic business forms had become noticeable, and as they took their origin in the exigencies of a capitalistic enterprise, we are justified in saying that the system of copyright is one of the features of a state of society in which capitalistic forms of production are predominant. It did not exist before the rise of capitalism, and it is altogether probable that it will decay and possibly disappear entirely when capitalism shall itself have been superseded by some other dominant form of economic life.

At first, the attempt of the publishers to protect themselves against piratical competitors took the form of obtaining special privileges from the government. This was rendered more easy by the desire of the governments themselves to keep an eye on what was being published. The censorship and copyright privileges went hand in hand: If the censor authorized the publishing of a book, the government also saw to it that it was not reprinted by unauthorized persons. In England, that famous institution which in most people evokes nothing but images of tyranny and oppression, the Court of Star Chamber, had a great deal to do with evolving those equitable principles on which later copyright legislation was built. When the notion of a free press, unhampered by the supervision of a censor, began to be advocated, the question of copyright had to be carefully considered. Milton, in his plea for freedom of the press, the celebrated *Areopagitica*, takes good care to guard against the insinuation that he would deprive printers of "their copies." When, after the revolution of 1689, the censorship was actually abolished, copyright protection was for a while in precarious condition, until the Parliament, in the reign of Anne, passed the statute of 1708, which has become the basis of subsequent copyright legislation in all the English-speaking countries.

Musical copyright was even slower in developing than the protection of literary publications. One reason of this was that the printing of music notes was a more difficult and expensive

process than the printing of text. Moreover, the market for the more elaborate compositions was much more restricted than even for the largest and most expensive books. The custom of copying musical compositions merely by hand persisted long after the market for the manuscript reproductions of literary works had entirely disappeared, and the practice is not unknown even at the present day. Consequently there was not, for a long time, the need for laws to prevent unauthorized printing of the manuscripts. On the other hand, the custom of exacting royalties for a performance sprang up quite naturally when authors had once conceived the idea that there was a possibility of getting money for their compositions. As long as the composer had to furnish the manuscript in the absence of a published copy, it was natural enough that he should receive a fee; and when finally the question of musical copyright was regulated by express law, this custom was extended to public performances even from published copies.

When copyright legislation, in the course of its development, reached what we may fairly call its modern phase, there still remained the business interest of the publisher as a powerful factor to be considered. In fact it proved to be a more powerful factor than the interest of the author himself in not a few instances. At first authors seem to have acquiesced quite generally in the notion that the interests of themselves and of the publisher were identical. Generally speaking, the publishers were in a better position to make their influence felt with legislatures and governments, and consequently they assumed to speak for the authors. When copyright legislation began to attract the attention of the general public, they discovered that it was easier to arouse sympathy for authors' rights than for the special interests of a handful of more or less wealthy business men who acted as intermediaries between the composers, writers, or artists and the public. The result has been that arguments in copyright discussions nearly always assume that it is the authors' rights that are to be protected, while the result of legislation seems, on the whole, to take the side of the publisher whenever his interests and those of the authors are not identical. The more "popular" a government is, that is the more it is a mere instrument in the hands of whatever clique or combination happens to be in the ascendency for the time being, the more pronounced is the preponderance of the publishers' interests over those of the authors. Publishers are capilistic business men, and consequently they profit from whatever tends to benefit the capitalist class generally. In the United States, more than in any other country, is government dominated

by the capitalists, and it is not surprising therefore that here the publishers have shaped and are still able to shape copyright legislation principally to suit themselves. At the opposite pole stand the German Empire, France, and some smaller countries, where the authors obtain the greatest consideration. In Germany this may be ascribed to the fact that there the capitalistic class has never been able to obtain complete sway against other economic interests and the influence of the monarchy; in France, which is almost as completely dominated by the capitalists as America, it happens that the copyright law in force, or at least its essential principles, dates back to 1793, before modern capitalism had acquired its complete ascendency. The Berne copyright union also throws its weight in favor of the authors where their interests conflict with those of the publishers.

Such a conflict arises, aside from questions of detail, especially with regard to the two different principles which serve as the foundation of copyright protection in one country or the other. It is possible to give such protection to an author simply because he is the author, and this may be done whether one believes in those principles of the Law of Nature, which were referred to in the beginning of this article, or whether one merely thinks that such a policy is on the whole more expedient from the standpoint of society at large. This principle is at the bottom of the law in Germany, France, and now to some extent also in Great Britain, since the revision of its copyright laws a few years ago. The opposite principle declares, in effect, that the special privileges of copyright must be acquired by compliance with whatever conditions government chooses to attach to the granting of the right. Under the opposite principle, one must always presume that a musical, literary or artistic copyright exists, unless it clearly appears that it has either been lost through lapse of time, or because the author failed to observe the conditions attached by the law. Under the last-named theory, however, the presumption is reversed: No work is protected by copyright, unless the author can prove clearly that he has taken certain formal steps to acquire such a privilege. Such steps are of various kinds, the more usual ones being publication with a copyright notice, registration of the claim with some designated official, deposit of copies of the work in designated places. The latter rule prevails in the United States, although some provisions of the present copyright statute seem to be designed to establish the theory that the copyright is as a matter of fact based on authorship. Unfortunately, this theory is not followed out in the statute as long as compulsory

notice of claim and registration remains. Yet it must be admitted that the present statute, according to which copyright protection begins the moment a work is published with a notice of copyright claim, is a great step in advance of all former statutes, under which copyright began with the registration.

The first of these alternative principles, according to which copyright attaches itself to a published work as a matter of course, although it may be lost by non-observance of legal conditions, is on the whole the more advantageous to the author, while the publishers find the opposite policy in many cases very convenient. It would carry us too far afield if we showed at length how this happens, but almost any author will soon learn from practical experience that the statement is true.

Now it will be seen after a little reflection that the interests of the publisher should have no consideration except in so far as by protecting him the author is protected. If we accept the Law of Nature doctrine, the right of the publisher to print the work at all must needs be derived from the author; that being so, it would be as absurd to give him any privileges conflicting with the property right of the author as it would be to say that a man to whom I have sold an acre may therefore take from me any further quantity of land he pleases. If, however, we base the copyright law on the ground that the welfare of society makes it expedient that authors should be given a certain amount of control over their published works, it would be necessary to prove that the publisher's interest is of equal social importance with the author's, and of superior importance in all cases where he is preferred over the author.

If authors were still able to live in fair comfort without selling the control of their works, as was the case before the capitalistic system became dominant in the world, it would be difficult to prove that copyright laws ought to be enacted. Any plea in favor of copyright must start with the assumption that musical, literary and artistic works are economic goods, by the exchange of which their producer desires to obtain the means of living. It is inconceivable that any true artist should fail to recoil from this notion, although in all probability, in modern times, he will have to compromise with it as best he may. Works of literature, music and art are designed to give esthetic pleasure, and there is something forced, artificial, even revolting in any attempt at measuring the value of such productions by a money standard. However, in modern times there is, generally speaking no other way for authors to live, and we can hardly demand of

them to accept the principle embodied in the motto of the seamen's guild of Bremen, who in their Hall proclaim that it is necessary to navigate but not necessary to live. We may regret the necessity for the compromise, for its bad effect on art of every kind is apparent enough. Nine-tenths of the superfluous work, nine-tenths of the stuff, in all the arts, that appeals to the low taste of the crowd, or to the lower taste of philistines with heavy bank accounts, would never be produced if artists were not forced to coin their talents into money. However, the authors are not primarily to blame for this. The guilt is that of a society which fails to provide for their support in some more rational manner.

We must further assume that the welfare of society demands the continued production of new works of literature, art and music. Fortunately, it is not probable that this will be disputed, in seriousness, by anybody. All copyright laws, therefore, should be designed to enable artists to maintain themselves and their families out of the proceeds of their works, if those works are of such a kind that a sufficient market can be found for them. In order to find a market authors need certain intermediaries, of whom the most important are the publishers. Publishers, being like authors compelled to support themselves out of the proceeds of their products, will not publish new works unless they are protected against piratical reprints. To this extent, therefore, the printers or publishers must be protected no less than the authors, but that is for no reason except that the authors themselves are thereby protected. Society has no particular interest in protecting the publishers on their own account. Generally speaking, it would be a matter of indifference if the publishers all became shoemakers instead, were it not for the necessity of bringing the works of the authors into the market. It follows that any provision of the copyright law conferring privileges on publishers to the detriment of authors cannot be for the interest of society, and consequently should not properly be a part of the law.

Society undoubtedly is interested in having authors, but it is no less interested in making it easy for readers, listeners and beholders to enjoy works of literature, music and art. If society had to care for the authors only, the privileges given to them might well be almost as extensive as if the law proceeded on the theory that the work belonged to the author in the same sense that potatoes properly belong to the farmer who has grown them. All laws actually in force in any country are the result of compromises between the need of protection to authors and the

desire to make it easy for the public to enjoy literary, musical and artistic works—disregarding for the present those cases where publishers have managed to acquire unfair and improper privileges.

If the economic protection of authors were the only consideration involved, it would be difficult to understand why copyrights should expire after the lapse of a definitely prescribed time. Most other property rights are not subject to such limitations but continue forever as long as their subject matter still exists. At first this looks like a rather severe handicap for the author, but a little reflection will show that it is justified not only from the point of view of society but even from that of the author himself. Experience shows that copyrighted works are much more expensive for the public to acquire than those which either have never enjoyed copyright protection or for which the copyright has expired. As soon as the period of protection has passed, if the work is still alive, inexpensive reproductions come into the market, to the great joy of the purchaser or "consumer." The mass of ephemeral works, of course, are not reproduced, but the same thing would be true if the copyright lasted forever; while society has an obvious interest in having those works find the widest possible market which have proven their excellence by surviving the protracted period of copyright protection. If the monopoly of the author lasted forever, which would necessarily imply that the monopoly would be exercised by his successors, or worse still, by an assignee and his successors, it would be quite conceivable that the world might be deprived of the enjoyment of master-pieces by some descendant of the author who might refuse to let new editions be published. This danger would be less great in the case of musical compositions than of books. For in the latter case religious or political prejudices would sometimes be the motive for such churlishness. Yet one could not be sure even in the case of musical works, for the indifference, or the mere whim of the copyright owner might have just as deplorable an effect as the more serious objections of the fanatic. Manifestly the interests of society would be greatly injured, either by keeping a work expensive, or by suppressing it altogether. Similarly, the injury to the artist would be just as great. To be sure, where he himself or his immediate descendants still get the benefit of the copyright, he may sometimes be inclined to value the material income higher than the added fame and added usefulness coming from the wider distribution an inexpensive edition is likely to attain; but it is quite inconceivable that an artist should feel so tender of the interests of

his great-great-grandchildren, not to mention the descendants of the publisher to whom he had sold his copyright, as to prefer their pecuniary profits to the wider distribution of his work. The fact of the matter is that the only people to be benefited by a permanent copyright, or even by a very protracted period of protection, are those belonging to the publishing fraternity.

A more substantial grievance of authors is the principle, still prevailing in the United States but abandoned in many other countries, under which copyright does not belong to a publication as a matter of course but must be specially claimed in some public manner, usually by a notice attached to every published copy. This principle is burdensome to the author, and of no particular benefit to the public; the only party, again, that occasionally derives an advantage from it is the publisher. Works published without copyright notice are usually those to which the author, at the time of publication, attaches little importance. Very often it is the case with the first attempts of young authors and composers. True, it is small trouble to print such a notice; but commonly, as in the United States, the notice, to be effective must be followed by registration, the payment of a fee, and the deposit of copies. Experience shows that in many instances the trouble and expense of doing this is more than the author cares to undertake. A certain proportion of the works so neglected afterwards become valuable, from a pecuniary point of view, because the author has become known. Then some enterprising publisher reproduces the earlier work without asking the author's leave, as under laws based on the special claim idea he has a right to do. If he pays some pittance to the author, it is a mere gratuity, which to a sensitive man would almost be an insult; in most cases, probably, the publisher does not see fit to show even such slight recognition of the author's existence.

The injury done to authors by the necessity of taking special steps to protect their rights does not end with possible pecuniary losses. The author of a non-copyrighted work is also helpless against reproduction of his work in so inferior a manner that his reputation must suffer. Musicians may be said to stand about half-way between painters, sculptors and other artists who are constantly suffering from such injuries and literary authors who are subjected to them comparatively seldom. It is even possible and happens comparatively often that a conscienceless publisher reproduces an unprotected work without so much as mentioning the author's name. Yet the latter is legally helpless and will have to be thankful if the publisher does not add the crowning

insult of ascribing the work to some stranger. In the latter case, the general principles of equity might perhaps afford a remedy, although it would be expensive and difficult. However, as far as known, no such suit has ever been prosecuted.

It is difficult to see what good reason there is for adhering to the principle that a copyright must be specially claimed in a formal way, instead of following as a matter of course the publication of the work. Apparently there is no reason, except the *vis inertiae*, the fact that it has been so for more than a hundred years. It is true that much stress is laid, by the older school of American lawyers, on the point that a copyright is a special, unusual privilege, curtailing the rights of all other persons to print what they like, wherefore the exercise of such privilege should be made as difficult as possible; but a younger class of lawyers is happily tending away from the traditional worship of mere scholastic concepts, such as "privilege" and the logical deductions flowing from them. Instead of that they seek to arrive at a fair adjustment of the interests of all concerned according to the actual facts and circumstances, and from this point of view, if it is once admitted that an author should have copyright protection at all, the exercise of his right should be made as easy and simple as possible. Sometimes the formalities are justified by drawing an analogy with those surrounding the obtaining of patents for mechanical inventions. That however is not good argument. A patent is only given after a difficult and exhaustive investigation by the government, because it is impossible, without expert information, to know whether a device is new or not. In the works subject to protection by copyright no such inquiry is necessary. Anybody can tell whether he is doing something original or pirating another man's work. In practice there can be no such thing as an unconscious infringement of a copyright, while it is entirely possible for two men independently to make the same mechanical invention. That one man should write the same musical composition or the same poem as another although he had never seen the first writer's work is conceivable, but about as probable as that letters in a printer's case should accidentally fall in such a way as to produce a line from Shakespeare. Therefore it is quite justifiable that the process of obtaining a patent should be difficult and expensive, but no reason can be drawn therefrom for surrounding an author's copyright with all sorts of obstacles.

The necessity of obtaining copyright by certain formal acts having no natural connection with authorship may be one of the

reasons why such queer, often grotesque notions are frequently met with regarding the nature and effect of copyright protection. It is not uncommon for persons otherwise quite intelligent to imagine that an author is helpless against an infringer who has taken care to introduce a few trifling changes. Among musicians this seems to take the form of counting the bars. Lawyers and copyright officials are constantly asked such questions as this: "How many bars do they have to change to make it impossible for me to get damages?" Readers of this magazine have hardly to be told that copyright is not such an absurd thing as this. If an infringer produces a substantial copy of the original he is liable, and what constitutes a substantial copy must be learned from all the surrounding circumstances but cannot be ascertained by a mechanical counting of the bars or notes.

Musical copyright has certain difficulties surrounding it of which other forms of authorship are free. Most of these grow out of the fact that the musical composer, in his attempts to reach his public, is even more dependent than others on various classes of intermediaries. If it seems to be difficult for many people to understand why it is wrong to reprint what others have written, it is still more so for many to see why they should not perform a musical composition, in public and for money, after they have bought and honestly paid for the score. Of late, the trouble has been increased by the invention of gramophones, player pianos and other devices for the production of music by wholly or partially mechanical contrivances. A little reflection ought to convince people that the performer or the manufacturer of disks and perforated rolls stands in no different position to the composer from the publisher who prints his score; and to allow them to use a work without paying royalty would be as unfair as to allow a printer to take the manuscript of the author without paying for it. These provisions do not constitute a preference of the musician over other classes of authors. If it were the general custom for people, instead of reading books themselves, to pay for having them read aloud in public, it would be but fair to make such public readers pay a royalty to the author. The poor composer might reasonably hope to find sympathetic comprehension among the performers of music. Yet seemingly there is a widespread feeling among orchestra leaders that they are the victims of unfair exactions if they are made to pay royalties to the writers of the pieces they play. According to recent newspaper information conductors who are engaged to interfere with conversation in restaurants and other public resorts have recently

threatened to boycott the American Society of Music Composers for demanding royalties, and the reason they urge seems to be that they are advertising the composers' music by playing it. On the same principle, a burglar would be advertising a shop he has robbed by causing the public to read the name of the victim in the newspapers.

To discuss the special forms which copyright protection may take under the laws of various countries, or to suggest amendments which it might be wise to adopt, cannot be a part of our present task. Such an attempt would require a treatise rather than a magazine article. We have tried, rather, to make clear to those who are not lawyers but are interested in the manner in which the law seeks to protect the products of their brains, the principles on which copyright laws may be based. Recapitulating the most important points it may be said: Copyright legislation is of comparatively modern growth. It is one of the results of new economic needs connected with the growth of capitalism and an attempt to bring the economic interests of the producers of works of literature, art and music under the rule of capitalistic economies. The ideal of capitalistic production is that every person shall produce some economic good not for his own consumption but for exchange with others who have produced the things he needs. Authors do not, in reality, produce economic goods. In a capitalistic society, they would therefore have nothing to exchange and would be likely to starve. Copyright is an attempt to treat their works as if they were economic goods, and enable authors to give something in exchange for the necessities and conveniences of life with which they are furnished by those who produce them. In a society, therefore, not built on the capitalistic plan, such as existed formerly and may exist again, there would be no need for copyright laws for the protection of the economic interests of authors. Such laws, however, might still be expedient for the protection of their artistic interests, by prohibiting inferior reproductions.

Copyright laws cannot be based on the mere proposition that the works of authors are by natural law their own. As a matter of fact, existing laws are all based on the theory that it is for the interest of society if authors are encouraged to devote themselves to their various arts. This being so, it is a sort of relapse into an outworn theory if copyright is made to depend on the performance of formal acts, like notice of claim and registration, rather than on the mere fact of authorship. The tendency of recent copyright legislation is everywhere away from such formalism.

In closing it may be said that as long as the capitalistic organization of society makes copyright laws necessary, the extent and effectiveness of the protection given to authors is a fair standard by which to measure the degree of civilization attained by any country. For such laws involve a recognition of the fact that there are factors of human activity more important to the world than the unlimited production of material wealth, not to speak of the mere accumulation of fortunes by more or less legitimate speculation.